

BY OVERNIGHT MAIL
FOR SETTLEMENT PURPOSES ONLY

October 3, 2006

Lee Henig-Elona, Esq.
Troutman Sanders LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174

Re: Shpack Landfill Superfund Site

Dear Ms. Henig-Elona:

Thank you for your September 21, 2006 letter and settlement offer requesting a *de micromis* settlement for Swank, Inc. ("Swank") at the Shpack Landfill Superfund Site in Norton and Attleboro, MA (the "Site"). We have evaluated your request to determine whether Swank would qualify as either a *de micromis* or *de minimis* party.

Section 107(o) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), provides a qualified statutory exemption from liability for response costs for *de micromis* parties where the total amount of materials containing hazardous substances contributed by the party to a site was less than 110 gallons of liquid materials or less than 200 pounds of solid materials. Section 122(g)(1)(A) of CERCLA provides discretionary authority to enter into settlements with certain *de minimis* contributors of hazardous substances to a Superfund site. To qualify for a *de minimis* settlement under Section 122(g)(1)(A), the settling party's contribution of hazardous substances must be minimal in its amount and toxicity in comparison to other hazardous substances at a site. See generally EPA's "Revised Settlement Policy and Contribution Waiver Language Regarding Exempt *De Micromis* and Non-Exempt *De Micromis* Parties," November 6, 2002 and EPA's "Streamlined Approach for Settlements With *De Minimis* Waste Contributors Under CERCLA Section 122(g)(1)(A)," July 30, 1993.

EPA has reviewed your submissions as well as other evidence, and has concluded that Swank does not qualify as a *de micromis* or *de minimis* party at the Shpack Site. Our reasons for this determination are explained below.

1. Swank Sent Waste to the Dumont Parcel and the Shpack Parcel Over a Period of Many Years.

Based on information provided by several witnesses, Swank sent waste to both the Dumont Parcel and Shpack Parcel¹ over a long period of time. EPA's evidence includes the following:

a. Albert Dumont, former owner/operator of Dumont Parcel

Albert Dumont, the owner/operator of the Dumont Parcel, testified that Swank sent waste to the Dumont Parcel and the Shpack Parcel from about 1946 through 1965. See generally Deposition of Albert Dumont under Rule 27 of the F.R.C.P. ("Dumont Depo. under Rule 27"), January 31, 2006, at 23-24 & 47-49. See also Administrative Deposition of Albert Dumont, May 19, 2004, at 32 & 42; Albert Dumont's response to EPA's Request for Information, dated October 29, 2003, response to Request 5.n. Mr. Dumont testified that Swank brought at least one truckload of waste per day to the Shpack Parcel and one truckload of waste per day to the Dumont Parcel. Dumont Depo. under Rule 27, January 31, 2006, at 48 & 50. He remembered that the driver of the Swank truck that brought waste to the Dumont Parcel was named "Larry" and that Larry has since died. Id., at 50.

b. David J. Brask, d/b/a Goditt & Boyer, former operator and transporter to Dumont Parcel

David J. Brask, a former operator of the Dumont Parcel and transporter of wastes to the Dumont Parcel, indicated in his response to EPA's request for information letter, dated March 20, 2006, that he saw Swank's trucks unloading at the Shpack Parcel in 1964 and 1965. See David J. Brask's Response to EPA's Request for Information, dated March 20, 2006, response to Questions 5.c. and 5.d.

c. Witness L

As a youth, Witness L would ride with his father to the Dumont Parcel in and around 1955, when Witness L was approximately 10 years old. Witness L remembered "two guys" that later formed Goditt & Boyer bringing waste to the Dumont Parcel during this time period. He recalled that Swank used the Dumont Parcel and he also recalled that Swank used its own trucks to bring waste to the Dumont Parcel. Witness L remembered seeing the name "Swank" on the side of the trucks that were disposing waste at the Dumont Parcel. He said that he saw the name often enough to remember the name of the company after all of these years.

¹ The term "Dumont Parcel" refers to approximately 3.4 acres of the Site which is located in Attleboro, on land formerly owned by Albert Dumont and currently owned by Attleboro Landfill, Inc. The term "Shpack Parcel" refers to approximately 6 acres of the Site which is located in Norton, on land formerly owned by Lea Shpack and Isadore Shpack and currently owned by the Town of Norton.

d. Witness EE

Witness EE worked for Attleboro Refining Company (“ARC”) for about 1.5 years in 1961 and 1962. On Saturdays, he would drive ARC’s waste to the Dumont Parcel. Other companies’ trucks that Witness EE saw at the Dumont Parcel during this time period included Swank.

e. Witness FF

Witness FF is a former employee of the Balfour Company. Witness FF worked for Balfour as a driver and maintenance man for 35 years starting in 1964. He hauled waste to the burning dump and later to the larger Dumont dump area. Over the years, he recalled seeing Swank and others dumping at Dumont’s dump. He could not say with certainty that these companies dumped at Dumont before 1966, but said it was “likely.” “Everyone went to Dumont,” he noted.

f. Witness T

Witness T worked for Goditt & Boyer driving “roll-offs” trucks from 1964 until 1978, and worked for another trucking company from 1978 until 1988. During the early years, he dumped at the Attleboro Landfill. Witness T remembered picking up “wooden pallets” from Swank and other companies.

g. Witness E

Witness E worked for Balfour for 40 years. He saw Swank company trucks and other companies on a daily basis going to the Attleboro Landfill or at the Attleboro Landfill.

h. Proximity of Swank facility to the Site

Evidence provided by witnesses that Swank used the Site for many years is consistent with the fact that the Swank facility was located a 6 Hazel Street in Attleboro, only about 2.5 miles from the Site.

Based on all of the above, Swank used both the Dumont Parcel and the Shpack Parcel for the disposal of waste on a regular basis during the period 1946 through 1965.

2. Swank Sent Hazardous Substances to the Site.

Evidence establishing that the wastes that Swank sent to the Site contained hazardous substances includes the following:

Swank manufactured costume jewelry at its Attleboro facility during the period 1946 through 1975. The nature of its operations at the Attleboro facility generally did not change over time. Swank's response to EPA's Request for Information, dated August 26, 2005, response to Questions 3.a. and 3.b.

In Swank's response to EPA's information request letter, dated August 26, 2005, Swank indicates that it used the following raw materials in its manufacturing process: brass, tin, silicone rubber molds, gold, nickel, copper, rhodium, plating solutions, lubricating oil or grease, degreasers, polishing cloths, semi-precious stones, and small amounts of glue and glue remover for setting stones. Id., Response to Question 3.e.

Swank also identifies the following wastes generated at its Attleboro facility during the period 1946 through 1965: plating solutions; distillation byproducts (still bottoms) containing 48% trichloroethylene ("TCE") and/or perchloroethylene ("PCE"); cutting, lubrication and hydraulic oils; cleaning fluids composed of TCE, PCE, and mineral spirits; metal hydroxide filters and spent electroplating filters; scrap metals; laquer thinners and/or mineral spirits; and plating solutions. Id., at Waste Survey.²

According to Swank, during the period 1946 to 1965, Swank's solvents would either be recycled on-site in a distillation process, be sent to a solvent recovery facility (Re-Solve, Inc., Recycling Industries and Northeast Solvents), or would be sent for off-site disposal at an unknown hazardous waste facility. Plating wastes were recycled on-site. Once plating solutions became spent or contaminated, they would be sold to a metal refiner (Glines & Rhodes in Attleboro) to recover the gold, nickel, copper or rhodium. Id., Response to Question 6.b.

Swank also listed the disposal location for oils, cleaning liquids, spent filters, and thinners, as "unknown" and that scrap metal was sent to a "scrap dealer." Id., at Waste Survey.

Swank acknowledges that for three to six months during 1955 it sent general refuse to the Shpack Parcel or the Dumont Parcel consisting of six cubic yards of general trash, five days per week. Swank's trash included one gallon of "still bottom" sludge (containing a mixture of TCE and/or PCE and oil and/or polishing compound solids) per week for an estimated twenty week period. Id., Response to Questions 2.b. and 2.c., referencing Swank's November 30, 1990

² EPA has also reviewed its files for Swank concerning the Re-Solve, Western Sand & Gravel, and Union Chemical National Priorities List sites, and found evidence that Swank sent wastes containing ethyl acetate to the Re-Solve site in the years 1972 - 1980; Swank sent plating sludge to the Western Sand & Gravel site (using Franklin Pumping as its transporter) in 1977 and 1978; and Swank sent drums containing ethanol, ethyl acetate and laquer thinner to the Union Chemical site from 1981 to 1984.

amended response to EPA's Request for Information of January 12, 1990 & Waste Survey.

All trash was removed from the Swank facility by a company owned truck. *Id.*, Response to Question 6.e. One of Swank's former maintenance workers was named "Larry." Swank's November 30, 1990 amended response to EPA's Request for Information of January 12, 1990, response to Question 2.

In addition to Swank's acknowledgment that it sent still bottoms to the Shpack Parcel for a three to six month period in 1955, Albert Dumont remembered that Swank's trucks were sometimes loaded with black polishing dust. Dumont testified that, in the time frame prior to 1965, "[m]ostly the bigger companies like Swank's would come with just their own truck loaded with dust." Dumont Depo. under Rule 27, February 1, 2006, at 83. He also testified that when Swank "brought [the black] polishing dust, that's the only thing they had on the truck" and he estimated that the amount of polishing dust held in each Swank truckload of dust was "four or five cubic yards." *Id.* at 84-85. See also Dumont Depo. under Rule 27, February 10, 2006, at 20 & January 31, 2006, at 23 (Swank brought "[m]ostly polish and dust.").³

Based on all of the above, Swank sent hazardous substances to the Dumont Parcel and the Shpack Parcel prior to 1966.

3. Swank Has Not Shown that It is Entitled to *De Micromis* or *De Minimis* Treatment.

In determining the volume of waste that should be attributed to Swank for purposes of settlement at the Shpack Site, any estimate of Swank's volume should consider all of Swank's "waste-in" to the Dumont Parcel and the Shpack Parcel. See EPA's "Final Guidance on Preparing Waste-in Lists and Volumetric Rankings for Release to Potentially Responsible Parties (PRPs) Under CERCLA ("Waste-In" Guidance)," February 22, 1991, at 15-16 ("... unless PRPs can demonstrate otherwise, Regions generally should include trash from commercial, institutional and industrial entities in waste-in calculations." *Id.*, at 15 [Emphasis in original]).

Moreover, where industrial trash was sent to a dump site prior to the enactment of the Resource Conservation and Recovery Act ("RCRA") in 1976, as it was at this Site, the Agency's assumption that all industrial trash should be counted as "waste-in" is particularly appropriate and defensible. *Id.*, at 6 (EPA assumptions regarding waste-in information "should be defensible.")

³ The City of Attleboro Redevelopment Authority's Cleanup Grant Application, dated December 14, 2005, concerning the Swank facility on Hazel Street in Attleboro, indicates that dust collectors were installed at the Swank facility in 1947.

Given the weight of the evidence that Swank used both the Shpack Parcel and the Dumont Parcel for waste disposal for many years prior to the enactment of RCRA, coupled with Swank's acknowledgment that it sent hazardous substances to the Site and Dumont's testimony that Swank sent truckloads of black polishing dust to the Site, EPA is unable to make a finding in support of Swank's *de micromis* or *de minimis* eligibility.

* * *

For all of the reasons provided above, it does not appear that Swank is eligible for a *de micromis* or *de minimis* treatment at the Shpack Superfund Site. By this letter, EPA encourages Swank's good faith participation in upcoming settlement negotiations for this Site.

Sincerely,

Audrey Zucker
Senior Enforcement Counsel

Attachments:

- Dumont Depo. under Rule 27, January 31, 2006, selected pages
- Dumont Depo. under Rule 27, February 1, 2006, selected pages
- Dumont Depo. under Rule 27, February 10, 2006, selected pages
- Administrative Deposition of Albert Dumont, May 19, 2004
- Albert Dumont's Response to EPA's Request for Information, dated October 29, 2003
- David J. Brask's Response to EPA's Request for Information, dated March 20, 2006
- Shpack Landfill Superfund Site Witness Summaries, compiled June 2006, summaries of interviews with Witness A - Witness JJ
- City of Attleboro Redevelopment Authority's Cleanup Grant Application, dated December 14, 2005

cc: Melissa Taylor, RPM (without attachments)
Deanna Chang, DOJ (without attachments)